

CARES ACT AIDS EMPLOYERS WHO CONTINUE TO PAY EMPLOYEES

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provides two distinct and substantial employment tax benefits for certain employers under Sections 2301 and 2302 of the Act. Section 2301 provides a refundable payroll tax credit for certain wages paid to employees from March 13 to December 31, 2020. Section 2302 allows employers to defer the deposit of certain employment taxes for as much as two years. Taken together, these provisions provide significant relief for employers and are designed to encourage employers to continue paying wages to employees during these unprecedented times.

Section 2301 Employee Retention Credit

This credit is not limited to small employers. However, any employer who receives a Small Business Administration Loan under the Paycheck Protection Program of the CARES Act is ineligible to receive this employee retention credit.

Section 2301 of the CARES Act provides a payroll tax credit of up to \$5,000 per employee for eligible employers. The credit is equal to 50% of “qualified wages” paid to employees during a quarter, capped at \$10,000 of “qualified wages.” The credit is available for wages paid from March 13 to December 31, 2020.

Eligible Employers

To be eligible, employers must meet the following criteria:

1. They must be carrying on a trade or business during 2020, and
2. During the calendar quarter, either:
 - a. Their operations were fully or partially suspended as a result of orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
 - b. Their gross receipts for the quarter were less than 50% of the gross receipts for the same calendar quarter in the prior year. The employer will remain eligible for the credit until such calendar quarter as their gross receipts equal 80% of the gross receipts for the same calendar quarter in 2019.

Qualifying Wages

The wages that can be used to calculate the tax credit differ based on whether the employer has over or under 100 employees. For employers with 100 or more full-time employees on average during 2019 (as determined by IRC Section 4980H as enacted by the Affordable Care Act), only wages paid to employees who are not providing services qualify for the credit. But for employers with less than 100 full-time employees, all wages paid to employees, regardless of whether the employees are providing services, qualify for the credit. For purposes of the employee count, organizations that are under common control (using IRC Section 52(a) and (b)) or that are a member of an affiliated service group (using IRC Section 414(m) and (o)) will be treated as a single employer.

Qualified wages are based on the definition of wages used for FICA taxes, plus the amount paid by the employer for health plan expenses. But the wages cannot exceed what the employee would have been paid for working an equivalent amount of time during the preceding 30 days. In other words, wage increases do not qualify for the employee retention credit. The CARES Act does not explain how this limitation should be calculated, so IRS guidance would be helpful.

Any federally mandated sick or child care leave paid under the Families First Coronavirus Response Act (FFCRA) is specifically excluded from “qualified wages” for the employee retention tax credit, since employers receive a dollar-for-dollar tax credit for such paid leave wages.

Insight:

The employee retention tax credit cannot be taken on the same wages as other tax credits, such as Work Opportunity Tax Credit under IRC Section 51 or Employer Credit for Paid Family and Medical Leave under IRC Section 45S.

How to claim the credit

Claiming the employee retention credit will track the same procedures for claiming the tax credits for providing federally mandated paid sick and child care leave under FFCRA. In IR 2020-57 (dated March 20, 2020), the IRS said that employers can immediately recoup their refundable tax credits for paid sick and child care leave by reducing their total federal tax deposit amount from **all** employees (not just from those who are receiving wages that qualify for the credit) by the amount of eligible credit. Specifically, employers can deduct the amount of tax credit for paid sick and child care leave from: (1) federal income taxes withheld from all employees’ pay; (2) the employees’ share of Social Security and Medicare taxes; and (3) the employer’s share of Social Security and Medicare taxes. Likewise, in IR 2020-62 (dated March 31, 2020), the IRS said that employers can follow that same process to immediately recoup their employee retention tax credit. These credits will ultimately be reconciled against the total tax liabilities when employers file their quarterly Form 941 or other employment tax returns.

In addition, the IRS has published [Form 7200](#), Advance Payment of Employer Credits Due to COVID-19, which allows employers to request a rapid refund for both the employee retention credit and the FFCRA paid sick and child care leave tax credits. Form 7200 can be filed (by fax) to request an advance of payments at any time before the end of the month following the quarter in which the qualifying wages were paid. It can be filed multiple times during the quarter if necessary. Amounts used to offset federal tax deposits as described above should not be duplicated on a request for refund on Form 7200. Ultimately, any amounts refunded using Form 7200 will also be reconciled on the employer’s quarterly Form 941 or other employment tax returns.

Insight:

The timing of the rapid refunds is still somewhat unclear. They are supposed to be processed within two weeks after receipt of Form 7200, but the IRS’s system for processing Form 7200 does not yet appear to be fully operational and it is unclear when it will be up and running. To maximize cash on hand, employers should compare whether they might be better off offsetting their accumulated tax credits from their upcoming payroll deposits or requesting the refund on Form 7200. The result may differ for each employer, depending on their facts and circumstances.

Section 2302 Employer Payroll Tax Deferral

Insight:

This payroll tax deferral is available to all employers with no size restriction. However, any employer whose Paycheck Protection Program (PPP) SBA loan is forgiven under Section 1106 of the CARES Act is ineligible for this payroll tax delay.

Section 2302 of the CARES Act permits employers to forgo timely payment of the employer portions of Social Security and RRTA taxes that would otherwise be due from March 27 through December 31, 2020, without penalty or interest charges (as confirmed by IRS Notice 2020-22, dated March 31, 2020). Employers must pay 50% of the deferred amount by December 31, 2021, and the remainder by December 31, 2022.

Insight:

If the employer utilizes this benefit and later is approved for PPP SBA loan forgiveness, it is not clear if the payment date on accumulated deferrals is accelerated to the forgiveness date or if deferrals cease on a prospective basis.

Self-employed individuals can take an equivalent tax deferral on 50% of the OASDI tax imposed on self-employment income under IRC Section 1401 and will not be penalized for failing to make estimated tax deposits on that amount during the deferral period.

To protect third parties, such as payroll service providers and certified professional employer organizations, the CARES Act requires that the customer or client bear the ultimately responsibility for the payment of any deferred taxes if they instruct the third party to defer payment.

Insight:

It is not yet clear how these two provisions would work in tandem. At the moment, it appears that an employer could defer its deposit of payroll taxes that are otherwise due from March 13 to December 31, 2020 (using the payroll tax holiday under Section 2302 of the CARES Act) and offset against those unremitted payroll taxes the employee retention credit (under Section 2301 of the CARES Act), and/or the tax credits for paying federally mandated FFCRA sick and child care leave, which would reduce the amount that the employer would eventually need to remit (i.e., 50% of the net amount would be owed on December 31, 2021, and the remainder would be owed on December 31, 2022).